Supreme Court, U.S.
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No. 95-1573

In the Supreme Court of the United States

OCTOBER TERM, 1995

ERIC STATTIN, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a receiver's certificate tendered in response to petitioner's retirement benefits claim constitutes a property interest protected by the Fifth Amendment to the United States Constitution.

2. Whether the Florida Depositor Preference Statute, which applies to distributions from receiverships established both before and after its enactment, retroactively changed the priorities followed by the receiver in violation of petitioner's Fifth Amendment property rights.

3. Whether the Resolution Trust Corporation incorrectly applied its regulation regarding unsecured claims, 12 C.F.R. 360.3, in violation of petitioner's Fifth and Fourteenth Amendment rights.

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. I) is unpublished, but the decision is noted at 74 F.3d 1252 (Table). The opinion of the district court (Pet. App. III-1 to III-14) is reported at 883 F. Supp. 678.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1995. A petition for rehearing was denied on February 29, 1996. Pet. App. IV. The petition for a writ of certiorari was filed on March 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. While petitioner was employed by Florida Federal Savings and Loan Association (FFS&L), he entered into an agreement whereby FFS&L agreed to pay him monthly benefits over a span of years following his retirement from employment. Pet. App. III-2 to III-3. After petitioner retired from FFS&L, the institution began making payments to him commencing in September, 1988; these payments were to continue for 15 years. Pet. 3. Florida Federal Savings Bank (FFSB), the successor to FFS&L, continued making retirement payments to petitioner until approximately October 31, 1990. Pet. App. III-3.

On November 9, 1990, the Director of the United States Office of Thrift Supervision (OTS) placed FFSB into receivership and appointed the Resolution Trust Corporation (RTC) as Receiver. The RTC, in its receivership capacity, then took possession of FFSB's assets and liabilities and transferred certain assets and liabilities to a newly created institution, Florida Federal Savings, F.S.B. (Florida Federal). Florida Federal was then placed into conservatorship and the RTC was appointed Conservator. Pet. App. III-3. In August, 1991, the RTC was appointed Receiver of Florida Federal. *Id.* at II-2.

2. On February 19, 1991, the RTC disaffirmed petitioner's retirement benefit agreement pursuant to 12 U.S.C. 1441a(b)(4)(A) and 1821(e)(1). Pet. App. III-3. The RTC notified petitioner of the disaffirmance and of the steps necessary to protect his interests. *Ibid.* Pursuant to the administrative claims procedures set forth in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 212(a), 103 Stat.

222 (12 U.S.C. 1821(d)(3)(B) and (5)(B)), petitioner filed a Proof of Claim in the receivership. Pet. App. III-3. On September 17, 1992, the RTC issued a Receiver's Certificate to petitioner, certifying that petitioner had made satisfactory proof of his claim in the amount of $495,285.48, the entire amount sought. *Id.* at III-4.

3. On July 3, 1992, the Florida Legislature enacted Section 658.84 of the Florida Statutes (Florida Depositor Preference Statute), which provides that any distribution on unsecured claims from a financial institution made after July 3, 1992, shall be made so that approved claims for "deposits," as defined in 12 U.S.C. 1813(*l*), have priority over approved claims for other general creditors. Fla. Stat. Ann. § 658.84(2) (West Supp. 1996); Pet. App. III-4. At that time, the applicable federal regulation, currently codified at 12 C.F.R. 360.3,[1] provided that, in distributing funds from a receivership, the RTC was required to observe a priority given to depositors under any applicable state depositor preference statute. Pet. App. III-8.

Following enactment of the Florida statute, the RTC notified petitioner that distributions on his receivership certificate would be subordinated because "all depositors (including the RTC as subrogee for uninsured depositors) have priority over other general creditor [sic] for payment." Pet. App. III-5. The notice also stated that "[t]he claims of the former association's depositors, and all other claimants of the former institution who have higher priority MUST

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[1] The regulatory provision which set priorities for unsecured claims was at that time 12 C.F.R. 360.2. On January 21, 1994, subsequent to the filing of the parties' district court memoranda, the provision was redesignated as 12 C.F.R. 360.3.

be paid in full (100%) before any distributions will be made to the general creditors." *Ibid.*

4. In May, 1993, petitioner filed a complaint against the RTC in the United States District Court for the Middle District of Florida seeking a declaratory judgment that Florida's Depositor Preference Statute "be construed to apply only to distributions occurring with respect to receiverships commenced after July 3, 1992, the effective date of the Statute." Pet. App. III-5. Petitioner also alleged that the statute, when applied to distributions under his receivership certificate, constituted a taking of property without just compensation in violation of the Fifth Amendment. *Id.* at II-7. In addition, he claimed that the RTC was unjustly enriched and sought relief against the RTC for his unpaid retirement benefits. *Id.* at III-5.

The district court dismissed petitioner's Fifth Amendment taking claim in an order and opinion issued on March 25, 1994. Pet. App. II-9 to II-10. It later granted summary judgment in favor of the RTC on the remaining claims. *Id.* at III-1 to III-14. The court found that, under the express terms of the Florida Depositor Preference Statute, the priority scheme for distributions was not limited by the date on which the financial institution was placed into receivership. *Id.* at III-13. Further, the court observed that the legislative history of the statute indicated that the legislature intended that the Florida Depositor Preference Statute apply to distributions from receiverships established both before and after the statute's enactment. *Ibid.*

The Eleventh Circuit affirmed in an unpublished, per curiam opinion. Pet. App. I.[2]

ARGUMENT

1. Petitioner claims (Pet. 5-15) that the receiver's certificate issued by the RTC regarding his unsecured retirement benefit claim is protected property under the Fifth and Fourteenth Amendments, and that the RTC's change of petitioner's priority standing among creditors, reflecting the mandate of the Florida Depositor Preference Statute, constituted a taking of property without due process of law. This Court has consistently held that legislation "readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." See *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986), quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). In *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978), this Court identified three factors that have "particular significance" in distinguishing Fifth Amendment takings from permissible governmental regulation: (1) "[the] economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."

In this case, the application of the priority scheme mandated by the Florida Depositor Preference Statute had an economic impact on petitioner since his claim will now be subordinated to the claims of

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[2] In December, 1995, a motion was filed to substitute the Federal Deposit Insurance Corporation (FDIC) as statutory successor to the RTC as Receiver for Florida Federal Savings, F.S.B., and Florida Federal Savings Bank.

depositors of the failed thrift. Prior to this change, petitioner would have received distributions on a pro rata basis along with all other approved claimants. Pet. App. III-4. The Florida Depositor Preference Statute, however, did not interfere with any distinct investment-backed expectation or similarly secured position enjoyed by petitioner because there can be no such expectation in an unsecured claim. See *North Arkansas Medical Center* v. *Barrett*, 962 F.2d 780, 790 (8th Cir. 1992) ("[T]he party claiming a Fifth Amendment violation in this [retroactive application of FIRREA to deny depositor's priority] had 'more than sufficient notice' that the business of enforcing claims against a failed thrift would be subject to federal regulation." (citations omitted)). Nor is the character of the governmental action, in "adjust[ing] the benefits and burdens of economic life to promote the common good," *Connolly*, 475 U.S. at 225, in the nature of a taking. See *id.* at 227 ("We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble.").

Because unsecured creditors of an insolvent entity hold only contingent rights, bankruptcy decisions have long held that Congress may legislatively change distribution priorities related to unsecured creditors, even if the change will affect estates being administered at the time of the change. See, *e.g.*, *In re Garland Corp.*, 6 B.R. 456, 462-463 (Bankr. 1st Cir. 1980) ("[T]here are no constitutional constraints inhibiting Congress in the exercise of its bankruptcy power from extinguishing the recovery rights of holders of unsecured claims, because an unsecured

claim confers no right in specific property of the obligor.") (citing *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 588 (1935)); *Coin Machine Acceptance Corp.* v. *O'Donnell*, 192 F.2d 773, 777 (4th Cir. 1951) ("We think there can be no question as to the power of Congress in the passage or amendment of a bankruptcy act to fix or rearrange priorities to be observed in the distribution of a bankrupt's estate."). As an unsecured general creditor, petitioner is subject to similar changes in the priority scheme applicable to his receivership certificate. See *In re Advisory Opinion to the Governor*, 593 A.2d 943, 949 (R.I. 1991) (concluding that a similar state Depositors Economic Protection Act did not cause unconstitutional takings because "general unsecured creditors by definition have no investment-backed expectations" but "are subject to such variables as changes in the law of receivership").

Thus, the district court correctly dismissed petitioner's Fifth Amendment takings claim, stating that "[t]he Court cannot conclude that Plaintiff's unsecured expectation of an unspecified distribution, as represented by his receiver's certificate, constitutes a property right which merits protection under the Fifth Amendment." Pet. App. II-9. The court of appeals affirmed this ruling, and no court of appeals has disagreed with its analysis.

2. Petitioner also argues (Pet. 15-29) that the Florida Depositor Preference Statute cannot be applied retroactively to reduce his priority status since the Florida legislature did not specifically provide that the statute reorder priorities established prior to its enactment. He further claims that the RTC applied the Florida Depositor Preference Statute retroactively to deny him his retirement bene-

fits in violation of Fifth and Fourteenth Amendment principles. *Ibid.*

The district court correctly concluded that "the language of Section 658.84 provides a clear indication that Florida's legislature intended the priority scheme therein to govern any distribution of a failed institution's assets made after July 3, 1992." Pet. App. III-11. The district court's interpretation is also supported by the fact that no pre-existing contract or vested rights are affected. Florida has adopted a strict definition of pre-existing or vested rights:

> To be vested, a right must be more than a mere expectation based on anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand.

In re Will of Martell, 457 So. 2d 1064, 1067 (Fla. Dist. Ct. App. 1984). In *Martell*, the court upheld a new statute that terminated a trust beneficiary's right to future distributions from a trust, even though the statute was enacted after the trust establishing the right to payment was created, but before distributions were made. *Ibid.* In dismissing petitioner's claims, the district court similarly found that petitioner had only an "unsecured expectation of an unspecified distribution." Pet. App. II-9.

A statute is not impermissibly retroactive "merely because some of the facts or conditions upon which its application depends came into being prior to the enactment." *United States* v. *Irvine*, 114 S. Ct. 1473, 1482-1483 (1994), quoting *United States* v. *Jacobs*, 306 U.S. 363, 367 (1939). As this Court emphasized in *Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1501 (1994), "[w]hen the intervening statute authorizes or

affects the propriety of prospective relief, application of the new provision is not retroactive." The only interests affected by the Florida Depositor Preference Statute after its effective date were possible future distributions from receivership estates. Therefore, the Florida Depositor Preference Statute did not have an unconstitutionally retroactive effect.

3. Petitioner also argues that the RTC failed to follow its own regulation governing priorities, thus violating his Fifth and Fourteenth Amendment rights. Pet. 15-19. He suggests that, since he was on equal footing with the RTC on the day the receivership began, the RTC should not have made a change in priorities, notwithstanding the Florida Depositor Preference Statute. Pet. 18-19. Petitioner notes that, after the enactment of the Florida Depositor Preference Statute, Congress amended the Federal Deposit Insurance Act, 12 U.S.C. 1821(d)(11), which now gives priority to depositors over general creditors in all saving and loan receiverships. Pet. 19. He suggests that since that federal statute only applies to receiverships which went into effect after its enactment, the RTC should have interpreted its regulation regarding the treatment of unsecured creditors and the application of state depositor preference laws, 12 C.F.R. 360.2(a)(6) (1993), to be similarly applicable only to receiverships which went into effect after the enactment of the Florida Depositor Preference Statute. Pet. 18-19.

As noted above, however, petitioner's claims are governed by the Florida Depositor Preference Statute, not 12 U.S.C. 1821(d)(11). See pp. 7-8, *supra*. The Florida statute does not contain any language that limits its application to new receiverships after its

effective date. It clearly applies to "any distribution" from receiverships disbursed after its enactment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

The Florida Depositor Preference Statute, Fla. Stat. Ann. § 658.84 (West Supp. 1996) provides:

658.84. Transfers by banks and other acts in contemplation of insolvency

(1) Any and all transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any bank or trust company or of deposits to its credit; all assignments of mortgages, securities, or real estate or of any judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use or for the use of any of its stockholders or creditors; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof made with a view to the preference of one creditor to another shall be void.

(2) Unsecured claims for payment against any financial institution shall have the following priority for any distribution made after July 3, 1992:

(a) Expenses of the liquidation or the receivership estate;

(b) State claims;

(c) Approved claims for a "deposit," as that term is defined in 12 U.S.C. § 1813(*l*);

(d) Approved claims for other general creditors;

(e) Approved claims for obligations subordinate to deposits and other general liabilities; and

(f) Shareholders' claims in proportion to the stock held by them respectively or their interest thereon as appearing.

(3) Except in any action brought by the department, no attachment, injunction, or execution shall be enforced against such financial institution or any of its property before final judgment in any suit, action, or proceeding in any state or federal court.